

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NORA K. FLOYD)	
Claimant)	
VS.)	
)	Docket No. 1,039,166
WILSON COUNTY HOSPITAL)	
Respondent)	
AND)	
)	
KANSAS HOSPITAL ASSOCIATION)	
WORKERS COMPENSATION FUND, INC.)	
Insurance Carrier)	

ORDER

Claimant appealed the February 19, 2010 Award entered by Administrative Law Judge (ALJ) Thomas Klein. The Workers Compensation Board heard oral argument on July 7, 2010.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Wade A. Dorothy of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. The parties agreed at oral argument before the Board that the date of accident was July 6, 2005.¹

ISSUES

In the February 19, 2010 Award, ALJ Klein determined claimant failed to meet her burden that any accident arose out of and in the course of her employment and that

¹ Neither party argued that there should be a different date of accident under K.S.A. 44-508(d).

claimant “failed to give timely notice pursuant to [K.S.A.] 44-520 and [K.S.A.] 44-520a.”² The ALJ denied the claim.

Claimant requests the Board find she sustained personal injury by accident arising out of and in the course of her employment with respondent each and every working day ending on or about July 6, 2005. Further, claimant requests the Board find that she gave timely notice and filed a timely written claim. Finally, claimant requests temporary total disability benefits, a 72 percent work disability³ and payment of all hospital and medical expenses associated with her work-related injury.

Respondent denies that claimant sustained personal injury through a series of accidents from October 24, 2003, through July 6, 2005, that arose out of and in the course of her employment. Additionally, respondent argues claimant did not give proper or timely notice of the alleged series of accidents as required by K.S.A. 44-520, she failed to timely serve a written claim for compensation with regard to the alleged series of accidents as required by K.S.A. 44-520a and, thus, her claim is barred.

The issues are:

1. Whether claimant sustained accidental injury that arose out of and in the course of her employment with the respondent.
2. Whether claimant provided timely notice and timely written claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties’ arguments, the Board finds and concludes:

The claimant worked for respondent for approximately 25 years as a CNA, CSSD (certified social service designee) and a CAD (certified activities director). July 6, 2005, was the last day claimant worked for the respondent.

On October 24, 2003, while answering a call light claimant slipped and fell due to urine being all over the floor.⁴ Claimant testified the fall knocked the breath out of her and

² ALJ Award (Feb. 19, 2010) at 3.

³ A permanent partial general disability under K.S.A. 44-510e that is greater than the whole person functional impairment rating.

⁴ Floyd Depo. at 9.

that “it was a hard fall.”⁵ The respondent’s Report of Accident and Investigation Report indicates the claimant bruised her left leg and knee.⁶

Claimant presented at the emergency room on October 27, 2003, complaining of knee pain. Claimant was treated there by Dr. Bert Chronister, who is also claimant’s personal physician. At the emergency room, claimant was diagnosed with a left sprained ankle and contusion to the left knee. A wrap was applied to her ankle and she was advised to take an analgesic of her choice.⁷ The claimant testified the bruise on her left knee and the swelling in her left ankle got better.

Claimant made no complaints to Dr. Chronister regarding her right leg or low back until six months after the October 24, 2003 accident.⁸ Dr. Chronister’s records indicate that the condition in claimant’s lower extremities and low back worsened over time from 2004 until March 2005, when the doctor referred claimant to Dr. William L. Dillon, an orthopedic surgeon. Dr. Chronister opined that claimant’s work activities probably aggravated the physical conditions in her lower extremities and low back.⁹

On March 15, 2005, Dr. Dillon examined claimant with respect to her low back complaints.¹⁰ Dr. Dillon subsequently performed surgery on claimant’s low back on August 17, 2005. She was released from his care on October 6, 2005, with restrictions of no heavy lifting and bending and a return-to-work date of October 24, 2005.¹¹ Dr. Dillon clarified or revised claimant’s restrictions on or about October 20, 2005. The revised restrictions were a 50-pound lifting limit, no excessive (more than four times in an hour) bending and no excessive (more than one time in an hour) stooping.¹²

⁵ *Id.*

⁶ *Id.*, Ex. 1.

⁷ Chronister Depo., Ex. 1.

⁸ Chronister Depo., Ex. 1 (April 16, 2004 office note).

⁹ *Id.*, at 7.

¹⁰ Dillon Depo. at 5 and Ex. 3.

¹¹ *Id.*, Ex. 4.

¹² Olson Depo., Ex. 4.

On October 25, 2005, claimant presented to Dr. Dillon with right knee complaints.¹³ At the time, claimant reported having fallen on her deck. The claimant ultimately had a total right knee replacement on May 10, 2006. Dr. Dillon opined that claimant's duties as a CNA would have aggravated her back, buttock and leg symptoms.¹⁴

At the request of claimant's attorney, Dr. Edward J. Prostic examined claimant on April 1, 2008. Dr. Prostic diagnosed claimant with postoperative discectomy at her low back and postoperative total knee replacement for injuries sustained during the course of her employment with respondent.¹⁵ Dr. Prostic placed the following work restrictions on the claimant: should not lift weights greater than 25 pounds knee-to-shoulder occasionally or 10 pounds frequently; no more than minimal lifting below knee height or above shoulder height; avoid frequent bending or twisting at the waist; avoid forceful pushing or pulling; avoid more than minimal climbing, squatting or kneeling; and avoid more than minimal use of vibrating equipment or captive positioning.¹⁶

Dr. Prostic opined claimant had sustained a 15 percent permanent partial impairment of the body as a whole for claimant's low back and a 15 percent permanent partial impairment of the body as a whole for her right knee (or a 37 percent impairment of the leg), which combined to an impairment of 28 percent of the body as a whole on a functional basis based on the fourth edition of the *AMA Guides*.¹⁷ Dr. Prostic also opined that claimant had a 44 percent task loss. And finally, Dr. Prostic opined that claimant's injuries were caused by the work she performed over time for the respondent.¹⁸

The claimant is not a good historian. She has trouble remembering dates and details. The Board finds this does not significantly diminish her credibility. Nancy Carpenter, claimant's supervisor who had worked with claimant for approximately 20 years, testified the claimant was a good and honest employee.¹⁹

¹³ Dillon Depo. at 11.

¹⁴ *Id.*, at 16.

¹⁵ Prostic Depo. at 10.

¹⁶ *Id.*, Ex. 2.

¹⁷ Prostic Depo at 11. The *AMA Guides* refers to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

¹⁸ Prostic Depo. at 10.

¹⁹ Carpenter Depo. at 13.

Claimant testified she told the respondent in 2004 about her problems with her low back and right leg and that the problems were caused by her work. Claimant also testified that she approached Susie Olson, the human resources director for respondent, about paying for medical treatment provided by Dr. Dillon.

Nancy Carpenter initially testified that claimant never reported problems with her back. However, after further questioning she testified that she did know claimant was having back surgery.²⁰

Susie Olson, director of human resources for the respondent, testified that claimant did not ask to file a workers compensation claim. Ms. Olson also testified that the claimant's October 24, 2003 workers compensation claim, which the respondent accepted, was never settled or closed out through settlement.²¹

Claimant made written claim on March 12, 2008,²² and filed an Application for Hearing on March 13, 2008.

October 24, 2003 accident

The Board finds and concludes that the October 24, 2003 accident is a single and distinct trauma. There was one identifiable event, the fall, and claimant admits that the injuries to her left lower extremity from that fall have resolved themselves. The respondent admits claimant sustained accidental injury on October 24, 2003, to her left leg.²³ The respondent's Report of Accident and Investigation Report completed the same day constitutes timely notice pursuant to K.S.A. 44-520.

In addition to timely notice, for a claim to be compensable a timely written claim and a timely application for hearing must be provided to maintain a claim for workers compensation benefits.²⁴ No proceedings for benefits shall be maintained if the claimant fails to timely satisfy requirements of any of the three.

²⁰ *Id.*, at 17.

²¹ Olson Depo. at 21.

²² The date on the written claim and the date of claimant's attorney's letter to respondent regarding written claim is March 11, 2008. Respondent received the written claim on March 12, 2008. Olson Depo., Ex. 9.

²³ Respondent's Submission Letter (filed Oct. 1, 2009) at 5.

²⁴ K.S.A. 44-520a and K.S.A. 44-534.

K.S.A. 44-534 requires an application for hearing be filed within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later. No application for hearing was filed within three years of the date of accident nor within two years of the last payment of compensation. Consequently, the October 24, 2003 accidental injury is not compensable.

Series

The claimant alleges a series of accidents ending on July 6, 2005. Claimant alleges injury to her low back and right leg. The parties agreed at oral argument before the Board that the date of accident for purposes of the alleged series of injuries was July 6, 2005.

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.²⁵ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.²⁶

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.²⁷ The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.²⁸

The Board finds the claimant has met her burden of proof proving she sustained a series of accidental injuries arising out of and in the course of her employment with respondent.²⁹ Dr. Dillon and Dr. Chronister opined that claimant's duties as a CNA would have aggravated her low back and lower extremity conditions or symptoms. Dr. Prostic

²⁵ *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

²⁶ *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

²⁷ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

²⁸ *Hanson v. Logan U.S.D.* 326, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

²⁹ The series pled is "[e]ach and every working day ending date last worked July 6, 2005." Form E-1, Application for Hearing (filed March 13, 2008). At the regular hearing, claimant's attorney noted the date of accident claimant was alleging was "each and every working day October 24, 2003, and continuing until the last date worked which we believe to be on or about July 6, 2005." R.H. Trans. (Nov. 25, 2008) at 4.

opined that claimant's injuries were caused by her work. In addition, claimant testified that the problems with her low back and right leg were due to her work. Further, the nature of claimant's work as a CNA, bending, lifting and standing support claimant's argument that she suffered a series of accidents.

In Kansas, an injured worker must satisfy the trinity of timely notice of accident, timely written claim and timely application for hearing in order to maintain a claim for workers compensation benefits. No proceedings for benefits shall be maintained if the worker fails to timely satisfy the requirements of any one of the three. Initially, the injured worker must provide the employer with the time, place and particulars of the accident within 10 days after the date of the accident.³⁰ The injured worker must next provide the employer with the written claim for compensation within 200 days after the date of the accident, or in cases where compensation payments have been suspended within 200 days after the date of the last payment of compensation.³¹ Lastly, the injured worker must file an application for hearing with the Division of Workers Compensation within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.³² Again, the failure to meet the time requirements of any of these three statutes prevents an injured worker from proceeding to obtain workers compensation benefits.

K.S.A. 44-520 requires notice of the accident be provided to the employer within 10 days after the date of the accident. The parties agreed the date of accident is July 6, 2005. The record indicates that on or by July 6, 2005, the claimant advised the respondent that she would be off work for back surgery related to her leg and hip pain. This indicates the respondent had knowledge of claimant's injuries on the day of the agreed date of accident. The Board finds this constitutes notice in accordance with the statute.

The Workers Compensation Act requires an application for hearing be filed within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later. In the instant case an application for hearing was filed on March 13, 2008. Accordingly, the application for hearing was timely filed.

The Act requires an injured worker to serve written claim upon the employer within 200 days after the date of the accident, or when compensation payments have been suspended within 200 days after the date of the last payment of compensation. Respondent's attorney represented at the regular hearing that no temporary disability

³⁰ K.S.A. 44-520.

³¹ K.S.A. 44-520a.

³² K.S.A. 44-534.

benefits or medical benefits had been paid.³³ The agreed date of accident in the instant case is July 6, 2005. The written claim in the instant case was made on March 12, 2008, more than two and one-half years after the date of the accident. The claimant failed to make a timely written claim; consequently, the claim is not compensable.

AWARD

WHEREFORE, the February 19, 2010 Award of ALJ Thomas Klein is affirmed, albeit for different legal reasons.

IT IS SO ORDERED.

Dated this ____ day of September, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

This claim was pled as a series of accidents ending July 6, 2005. During oral argument before the Board, the parties agreed to a date of accident of July 6, 2005. However, there can be one date of accident for the computation of benefits under the award and another for purposes of counting days for the determination of whether notice and written claim were timely. It was not clear at oral argument whether the agreement was intended to be for all purposes. Nevertheless, because neither party argued that K.S.A. 44-508(d) required a finding of a different accident date, I concur with the majority that the parties' announcement at oral argument before the Board should be taken as a

³³ R.H. Trans. (Nov. 25, 2008) at 6.

stipulation to a date of accident for all purposes. Based upon an accident date of July 6, 2005, claimant failed to prove that she timely served a written claim upon the employer.

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge